

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EUSEBIO NAVERRETE

Claimant

VS.

FARMLAND FOODS

Self-Insured Respondent

Docket No. 1,005,498

ORDER

Claimant requested review of the June 23, 2005, Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on October 4, 2005.

APPEARANCES

Beth Regier Foerster, of Topeka, Kansas, appeared for the claimant. Jennifer Arnett, of Overland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

In his Award, the ALJ found that claimant's injury was to his shoulder girdle, which was an area of the anatomy covered by K.S.A. 44-510d(a)(13) as a scheduled injury. The ALJ awarded claimant a 9 percent permanent partial impairment to the left shoulder based on Dr. Peter Bieri's letter of April 27, 2005, which converted his 5 percent whole person impairment rating of claimant to a 9 percent upper extremity impairment.

Claimant contends the decision of the ALJ finding claimant's injury to be a scheduled injury to the shoulder was incorrect. Claimant asserts his injury was to his cervicothoracic area and he should be awarded an impairment rating to the body as a whole. Claimant also argues he should be awarded work disability.

Respondent requests that the Board enter an award of no permanent impairment to claimant as a result of the March 29, 2001, accident or, in the alternative, the ALJ's award be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant filed two separate workers compensation claims against this respondent. This claim is for his first injury, which occurred on March 29, 2001. On May 4, 2001, claimant suffered an injury to his right foot. The claim concerning claimant's right foot, Docket No. 1,005,499, has been settled.

Claimant began his employment with respondent in 1999, working on the scale weighing meat. On the date of the accident, March 29, 2001, he and some co-workers were moving some meat from storage. While doing this, claimant's arms were extended overhead, and he felt pain on his left side. Respondent sent him to Dr. Dick Geis.

Dr. Geis testified claimant had a left rhomboid muscle strain and was complaining of pain in an area from the medial to the left scapula. Claimant did not describe any symptoms relative to the spine, neck or back. Dr. Geis prescribed Ibuprofen and placed claimant on modified duty with restrictions of no lifting above the shoulder and a ten pound weight limit. An x-ray was taken of the left shoulder on May 3, 2001, which showed no fracture or dislocation. An arthrogram was also done on the left shoulder, which showed no evidence of a rotator cuff tear.

Dr. Geis prescribed physical therapy for claimant beginning April 30, 2001. The May 21, 2001, physical therapy records note claimant indicated he had a pain level of 0 on a scale of 0 to 10, and physical therapy was discontinued. Dr. Geis released claimant from treatment on June 6, 2001, to return to full duty with no restrictions.

Claimant stated that respondent terminated him because it was not able to accommodate his restrictions. He claims he had an argument with his supervisor wherein his supervisor asked him if he could work like he used to, and claimant told him he could not. Both parties agree claimant was terminated on May 18, 2001. Claimant then went to work for another company but was only able to work for two weeks because his back was hurting. After that, he went to work as a custodian. Most recently, he went to work for Aztec Cleaning, and at the time of the regular hearing, he was earning \$7 an hour and working approximately 30 hours a week.

Dr. Geis again saw claimant on October 1, 2002, at the request of respondent. By that time, claimant had left his employment with respondent and was working elsewhere.

At that time, Dr. Geis concluded claimant was continuing to have discomfort in the area of the left rhomboid muscles. Although Dr. Geis did not find muscle spasm or guarding during his October 1, 2002, examination of claimant, he noted that Dr. Delgado did make such findings during his August 13, 2002 examination. However, Dr. Geis agreed that those findings were likely related to claimant's subsequent work activities.

Q. And is it fair to say that a doctor such as Dr. Delgado who's hired by an attorney for the injured worker, a year and 2 or 3 months after the fact after the patient has gone on to work in other jobs that include this type of activity he described to you, would be more likely to be assessing problems that have nothing to do with something that occurred a year-and-a-half earlier?

MS. FOERSTER: Objection; speculation.

THE WITNESS: More likely so, yes.

Dr. Geis testified that he felt claimant was sincere in describing his symptoms. In his report, Dr. Geis rated claimant as having 1 percent permanent partial impairment to the body as a whole based on the claimant's subjective complaints of pain in the parathoracic (rhomboid area), using the cervicothoracic diagnosis related estimate (DRE) Category I in the *AMA Guides*¹. But at his deposition, Dr. Geis said there were no clinical findings upon which he could rate either claimant's spine or his shoulder. He said except for claimant's subjective complaints of pain, there was no rateable impairment.

Dr. Geis stated that if he saw a list of tasks of claimant's previous 15-year work history, he would say that claimant could do everything on the list and gave claimant no permanent restrictions. However, Dr. Geis also testified that, given his examination and rating of claimant, if claimant's job at respondent required him to shovel meat into large buckets with a scoop, lifting frequently 30 to 40 pounds from 2 to 4 hours, or to stack full boxes of burritos weighing 40 to 50 pounds onto pallets, claimant would have increased discomfort. He said claimant would also have increased pain from working at an overhead level.

Dr. Sergio Delgado, a board certified orthopedic surgeon, examined claimant on August 13, 2002, at the request of claimant's attorney. Dr. Delgado's physical findings included spasm and guarding involving the left posterior shoulder girdle region, which involved the supra and infraspinatus muscles and the interscapular muscles, which would be the rhomboids, the levator scapulae and possibly the trapezius. Dr. Delgado's diagnosis was myofascial strain involving the left posterior shoulder girdle musculature.

¹American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Using the *AMA Guides*, Dr. Delgado rated claimant's based on the cervicothoracic DRE Category II, minor impairment, which refers to injury with spasm and guarding as objective findings. Dr. Delgado assigned a 5 percent whole person permanent partial impairment to claimant. When asked why he did not rate claimant using the hand and upper extremities section of the *AMA Guides*, Dr. Delgado testified that he believed claimant's injury went beyond what he considered anatomically to be the shoulder. Dr. Delgado also assigned restrictions of weight pushing and pulling not to exceed 75 pounds occasionally, 50 pounds repetitively, using the left arm, alternate sitting and standing every two to three hours and no overhead work. Dr. Delgado recommended further treatment for the left shoulder girdle region, such as trigger point injections, physical therapy, and anti-inflammatory medicine.

Dr. Delgado reviewed task loss lists created by Dick Santner and Mary Titterington: Dr. Delgado, using Mr. Santner's list, opined that because of the March 29, 2001, injury, claimant had lost the ability to do 3 out of 15 tasks, which calculates to a 20 percent wage loss. Using Ms. Titterington's list, Dr. Delgado believed claimant had lost the ability to do 7 out of 20 tasks for a 35 percent wage loss because of the March 29, 2001, injury.

Dr. Steven Hendler, who is board certified in physical medicine and rehabilitation, examined claimant on December 9, 2003, at the request of respondent's attorney. Dr. Hendler performed a physical examination of claimant and found no positive objective pathology in regard to claimant's left shoulder. Claimant indicated to Dr. Hendler that he had both shoulder and back pain, reporting tenderness along the mid scapular border on the medial side. Dr. Hendler's initial finding was that claimant had sustained a shoulder strain. Dr. Hendler believed that, regarding the shoulder strain, claimant's permanent partial impairment was 0 percent. He attempted to assess claimant pursuant to the *AMA Guides* but found nothing to allow him to find impairment. Dr. Hendler did not feel any restrictions were necessary and said there was no need for further treatment. Dr. Hendler testified that in his opinion, claimant's injury should be rated as a scheduled injury to the shoulder rather than to the body as a whole.

Dr. Peter Bieri examined claimant on February 2, 2005, at the request of the ALJ. Dr. Bieri gave claimant permanent restrictions of 70 pounds lifting, frequent lifting not to exceed 35 pounds, and constant lifting of not more than 15 pounds.

Using the *AMA Guides*, Dr. Bieri found claimant's injury fit in the cervicothoracic Category II. He testified that Dr. Geis' records are consistent with the injury being at the cervicothoracic spine. Dr. Bieri opined that claimant incurred an injury involving the left shoulder and base of the neck, with subsequent symptomatology on the right, and his diagnosis was myofascial pain and muscle strain. He found that claimant had reached maximum medical improvement and concluded that claimant is entitled to a 5 percent whole person impairment for the March 29, 2001, injury.

Dr. Bieri looked at the task list prepared by Dick Santner and testified that because of claimant's March 29, 2001, accident, he has lost the ability to perform 2 of the 15 tasks, which calculates to 13 percent task loss.

After the deposition of Dr. Bieri had been taken and the regular hearing had been held, the ALJ wrote Dr. Bieri requesting clarification of the area of claimant's anatomy that Dr. Bieri found was impaired. Dr. Bieri's response to the ALJ, dated April 27, 2005, indicated that claimant's injury was consistent with pain originating in the cervicothoracic spine region and involving the shoulder girdle area. Dr. Bieri stated he believed the shoulder girdle is an anatomic term defining the area surrounding the shoulder but was not part of the shoulder itself. Although Dr. Bieri converted the 5 percent whole person impairment rating to a 9 percent upper extremity impairment rating to the left shoulder, he stated he continued to believe claimant's muscular strain was likely isolated to the paraspinal region and claimant was entitled to a whole body disability rating. The ALJ noted:

While Dr. Bieri did not believe the shoulder girdle should be rated as part of the shoulder, K.S.A. 44-510d(a)(13) specifically includes that particular area of the anatomy as a scheduled injury and therefore claimant is limited to compensation for injury to the "shoulder" at the 225 level.

The parties stipulated to the entry into evidence of the reports of Dick Santner and Mary Titterington concerning their respective vocational evaluations of the claimant. Claimant was referred to Dick Santner by his attorney. At the time of the evaluation, claimant was employed as a custodian making \$5.50 per hour and working 4 to 4 and one-half hours per day. Mr. Santner's report noted that claimant was working beyond the restrictions provided by Dr. Delgado. Mr. Santner's report indicated that he could think of no jobs in the Topeka area where claimant could work within his restrictions. However, the restrictions claimant was exceeding appear to be those imposed pursuant to claimant's right foot injury, *i.e.*, the requirement that claimant be able to alternate sitting and standing.

Ms. Titterington's report indicates that at the time she visited with claimant, he was employed by a cleaning service earning \$6.50 per hour and working approximately 32 hours per week. Claimant told Ms. Titterington that he had applied for and was hired as a janitor in the emergency room of a hospital making \$10 per hour. However, because of claimant's "weak stomach,"² he only lasted 6 hours at that job. Claimant had also applied for jobs at three factories and another janitor service. He never received calls back from the factories, and the janitor service offered him a position for less money than he was currently making.

During the approximately 10 weeks following his injury that the claimant was receiving treatment, his complaints were limited to the area of the shoulder and shoulder musculature. Claimant's symptoms resolved, and he was released to full duty without restrictions. Following this release by Dr. Geis, claimant did not return to work with

²Stipulation (Jan. 11, 2005) Mary Titterington report at 3.

respondent but went to work elsewhere with other employers. It was not until claimant was seen by Dr. Delgado over a year later, in August 2002, that there is any mention of neck complaints or a diagnosis of myofascial pain. Furthermore, claimant was symptom free when he was released by Dr. Geis in June 2001. Thereafter, claimant went to work for other employers and performed manual labor jobs. Under the facts presented, the Board cannot relate claimant's current symptoms to his March 29, 2001, accident with respondent. Accordingly, claimant is denied an award of permanent partial disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated June 23, 2005, is modified to award no permanent partial disability compensation but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2005.

BOARD MEMBER

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DISSENT

I respectfully disagree with the majority. I believe the greater weight of the evidence establishes that claimant sustained a cervical injury. Accordingly, I believe claimant should receive permanent partial disability benefits under K.S.A. 44-510e.

BOARD MEMBER

c: Beth Regier Foerster, Attorney for Claimant
Jennifer Arnett, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director